

S.Ct. No. 85557

**IN THE
MISSOURI SUPREME COURT**

JOHN A. WALLINGFORD,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Buchanan County, Missouri
5th Judicial Circuit
The Honorable Randall R. Jackson, Judge
Division 1

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

John A. Wallingford appeals the dismissal of his Rule 29.15 motion for postconviction relief by the Honorable Randall R. Jackson, Judge of Division 1, Circuit Court of Buchanan County. The judgment sought to be vacated was for three counts of delivery of a controlled substance, Section 195.211, RSMo 2000. Mr. Wallingford was sentenced to concurrent terms of fourteen years in prison for each count.

On July 31, 2003, the Court of Appeals, Western District, affirmed the dismissal of Mr. Wallingford's Rule 29.15 motion. Mr. Wallingford filed a motion for rehearing, which the Court of Appeals denied on September 2, 2003. On November 25, 2003, this Court sustained Mr. Wallingford's application for transfer to the Missouri Supreme Court.

STATEMENT OF FACTS

The state charged John A. Wallingford with three counts of delivery of a controlled substance, Section 195.211, RSMo 2000 (L.F. 7-9, 10-12).¹ After a jury trial, Mr. Wallingford was convicted of all three counts and was sentenced to three concurrent terms of fourteen years in prison (L.F. 5-6, 38-40).

On direct appeal, the Court of Appeals, Western District, affirmed Mr. Wallingford's convictions. State v. Wallingford, 43 S.W.3d 852 (Mo. App. 2001). The Court of Appeals issued its mandate on May 23, 2001(PCR L.F. 88).

Mr. Wallingford filed a timely *pro se* Rule 29.15 motion on August 21, 2001 (PCR L.F. 1, 5-79). Appointed postconviction counsel filed a timely amended motion on November 26, 2001 (PCR L.F. 1-2, 80, 81-82, 83-85, 86, 87-165). The motions alleged several claims of ineffective assistance of trial and appellate counsel (PCR L.F. 5-79, 87-165).

On November 30, 2001, Mr. Wallingford filed a *pro se* "motion to correct clerical mistake under Rule 29.12(c)" (PCR L.F. 166). This motion alleged that Mr. Wallingford inadvertently forgot to sign his *pro se* Rule 29.15 motion, that the circuit clerk had nonetheless filed the motion despite the lack of signature, and that postconviction counsel would incorporate the claims of the original motion into the

¹ The record on appeal consists of the trial transcript (Tr.), the direct appeal legal file (L.F.), and the postconviction relief legal file (PCR L.F.).

amended postconviction motion (PCR L.F. 166). The “motion to correct clerical mistake” requested that the court allow Mr. Wallingford to “correct said unsigned original PCR pro se motion that was mistakenly filed by the said Honorable Clerk of the Court” (PCR L.F. 166).

On January 7, 2002, appointed postconviction counsel filed a “motion to accept movant’s declaration pursuant to Tooley v. State” (PCR L.F. 169-170). This motion alleged that Mr. Wallingford completed his *pro se* Rule 29.15 motion using Criminal Procedure Form 40, but failed to sign under the declaration paragraph following paragraph 18 (PCR L.F. 169). The motion noted that Mr. Wallingford did sign and notarize his signature after the Forma Pauperis Affidavit on page 6 of Form 40 (PCR L.F. 169). The motion alleged that Mr. Wallingford did not realize that he had to sign below *both* paragraph 18 and the Forma Pauperis Affidavit, and that appointed counsel first learned that the signature was missing just prior to November 26, 2001, the date she filed the amended motion (PCR L.F. 169-170). The motion alleged that Mr. Wallingford and counsel had taken the steps necessary to cure the deficiency in the *pro se* pleading, by having Mr. Wallingford sign a declaration tracking the language set out in the declaration paragraph under paragraph 18 on page 5 of Form 40 (PCR L.F. 170). The motion argued that the error in Mr. Wallingford not signing his motion must be and *can be* cured, under Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000) (PCR L.F. 170).

In addition to the motion, counsel filed a declaration signed by Mr. Wallingford (PCR L.F. 167-168). The declaration stated:

DECLARATION

My name is John A. Wallingford. I am the Movant in this cause. When I filed my Form 40, I did not realize that I had to sign my name at the bottom of page 5, underneath the paragraph after paragraph 18. I did not sign at the bottom of page 5. To correct this omission, I state as follows:

1. I, John A. Wallingford, movant in this case, state by subscribing to this Declaration that I know the contents of my *pro se* Rule 29.15 motion, filed on August 21, 2001, that the information stated in my *pro se* motion is, to the best of my knowledge, true and correct, that I listed in my *pro se* motion every claim known to me for vacating, setting aside, or correcting the conviction and sentence attacked in the *pro se* motion; and that I understand that I waive any claim for relief known to me that I did not list in my *pro se* motion.

(PCR L.F. 167-168).

On March 13, 2002, the motion court issued findings of fact and conclusions of law denying Mr. Wallingford's motion for postconviction relief (PCR L.F. 172-174). The motion court found that it had no jurisdiction over Mr. Wallingford's Rule 29.15 motion, because Mr. Wallingford failed to sign his *pro se* motion (PCR L.F. 172-173).

The court rejected Mr. Wallingford's attempt to remedy the defect, finding that Mr. Wallingford failed to file a legally sufficient motion for postconviction relief within the 90 days after the Court of Appeals issued its mandate (PCR L.F. 172-173). The motion court did not reach the merits of any of Mr. Wallingford's claims, and assessed court costs against Mr. Wallingford, citing the Prisoner Litigation Reform Act, Section 506.360, et seq., RSMo 2000 (PCR L.F. 174). This appeal follows (PCR L.F. 176).

POINT RELIED ON I

The motion court clearly erred in denying Appellant's Rule 29.15 motion and in refusing Appellant's offered Declaration, which attempted to correct the lack of signature in his *pro se* motion, in violation of Appellant's rights to due process of law and to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Appellant, realizing that he had inadvertently failed to sign his *pro se* motion under the declaration following paragraph 18 on page 5 of Form 40, advised his appointed counsel of this fact, and counsel and Appellant took action to correct the defect as soon as was reasonably possible. The motion court should have accepted Appellant's Declaration and found that it had jurisdiction over Appellant's case, because 1) Appellant invoked the motion court's jurisdiction by filing his *pro se* motion within 90 days of the Court of Appeals issuing its mandate, 2) Appellant signed the Forma Pauperis Affidavit on page 6 of Form 40 and had his signature notarized, thus demonstrating that he understood the significance of his actions and consented to the filing of his Form 40, and 3) Rule 55.03(a) allows for the omission of the signature to be corrected promptly after the deficiency is called to the attention of the party or his attorney.

Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000);

Wilson v. State, 813 S.W.3d 833 (Mo. banc 1991);

State v. White, 873 S.W.2d 590 (Mo. banc 1994);

State v. Bradley, 811 S.W.2d 379 (Mo. banc 1991);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sections 10 and 18(a);

Missouri Supreme Court Rules 24.035, 29.12, 29.15 and 55.03; and

Missouri Supreme Court Rule 29.15 (Repealed January 1, 1996);

POINT II

The motion court clearly erred in denying Appellant's Rule 29.15 motion without issuing findings of fact and conclusions of law on all allegations raised in the amended motion. The motion court's failure to rule on Appellant's issues violated the explicit requirements of Rule 29.15 and denied Appellant an opportunity for meaningful appellate review and due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Fields v. State, 572 S.W.2d 477 (Mo.banc 1987);

Barry v. State, 850 S.W.2d 348 (Mo. banc 1993);

Charles v. State, 792 S.W.2d 59 (Mo. App. 1990);

Criner v. State, 790 S.W.2d 524 (Mo.App. 1990);

U.S. Const., Amends. V and XIV;

Mo. Const., Art. I, Section 10;

Missouri Supreme Court Rule 29.15

POINT III

The motion court clearly erred in assessing court costs against Appellant and ordering Appellant to pay \$108.00 under the Prisoner Litigation Reform Act for filing a Rule 29.15 motion, in violation of Appellant's rights to due process of law and to equal protection of the law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, because the court's order exceeds the power granted the court by Section 506.360 et seq., in that Rule 29.15(b) specifically states that "No cost deposit shall be required", and the Prisoner Litigation Reform Act does not encompass Rule 29.15 as a civil action.

Harris v. Munoz, 6 S.W.3d 398 (Mo. App. 1999);

Adams v. Schriro, 31 S.W.3d 461 (Mo. App. 2000);

Cooper v. Minor, 16 S.W.3d 578 (Mo. banc 2000);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Section 10;

Section 506.360 et seq., RSMo 2000;

Section 506.366, 506.369, 506.375, 506.381, 506.384, 506.387, 506.390, and 514.040,

RSMo 2000; and

Missouri Supreme Court Rule 29.15.

ARGUMENT I

The motion court clearly erred in denying Appellant's Rule 29.15 motion and in refusing Appellant's offered Declaration, which attempted to correct the lack of signature in his *pro se* motion, in violation of Appellant's rights to due process of law and to counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Appellant, realizing that he had inadvertently failed to sign his *pro se* motion under the declaration following paragraph 18 on page 5 of Form 40, advised his appointed counsel of this fact, and counsel and Appellant took action to correct the defect as soon as was reasonably possible. The motion court should have accepted Appellant's Declaration and found that it had jurisdiction over Appellant's case, because 1) Appellant invoked the motion court's jurisdiction by filing his *pro se* motion within 90 days of the Court of Appeals issuing its mandate, 2) Appellant signed the Forma Pauperis Affidavit on page 6 of Form 40 and had his signature notarized, thus demonstrating that he understood the significance of his actions and consented to the filing of his Form 40, and 3) Rule 55.03(a) allows for the omission of the signature to be corrected promptly after the deficiency is called to the attention of the party or his attorney.

The motion court dismissed Mr. Wallingford's Rule 29.15 motion because Mr. Wallingford failed to file a signed *pro se* motion within ninety days of the date that the

Court of Appeals issued its mandate in Mr. Wallingford's direct appeal (PCR L.F. 180-182). The motion court held that it had no jurisdiction to allow Mr. Wallingford to cure the defect, because the ninety day "jurisdictional period" had "long run before any request to cure was filed" (PCR L.F. 181). This finding is clearly erroneous. Mr. Wallingford invoked the motion court's jurisdiction by filing his *pro se* motion within 90 days of the date the Court of Appeals issued its mandate in his direct appeal (PCR L.F. 5, 87-88). The *pro se* motion was sufficient to demonstrate to the motion court that Mr. Wallingford understood the significance of his actions and consented to the filing of the motion. Appointed postconviction counsel then filed a timely amended motion signed by the attorney. Finally, Mr. Wallingford promptly took steps under Rule 55.03(a) to cure the lack of signature, once it was brought to his and his attorney's attention.

This Court's review is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. McElheny v. State, 29 S.W.3d 861, 862 (Mo. App. 2000). They are clearly erroneous when a review of the entire record leaves a definite and firm impression that a mistake has been made. Id.

Mr. Wallingford filed a timely *pro se* Rule 29.15 motion on August 21, 2001 (PCR L.F. 1, 5-79). Appointed postconviction counsel filed a timely amended motion on November 26, 2001 (PCR L.F. 1-2, 80, 81-82, 83-85, 86, 87-165). The motions alleged several claims of ineffective assistance of trial and appellate counsel (PCR L.F. 5-79, 87-165).

On November 30, 2001, Mr. Wallingford filed a *pro se* “motion to correct clerical mistake under Rule 29.12(c)” (PCR L.F. 166). This motion alleged that Mr. Wallingford inadvertently forgot to sign his *pro se* Rule 29.15 motion, that the circuit clerk had nonetheless filed the motion despite the lack of signature, and that postconviction counsel would incorporate the claims of the original motion into the amended postconviction motion (PCR L.F. 166). The “motion to correct clerical mistake” requested that the court allow Mr. Wallingford to “correct said unsigned original PCR *pro se* motion that was mistakenly filed by the said Honorable Clerk of the Court” (PCR L.F. 166).

On January 7, 2002, appointed postconviction counsel filed a “motion to accept movant’s declaration pursuant to Tooley v. State” (PCR L.F. 169-170). This motion alleged that Mr. Wallingford completed his *pro se* Rule 29.15 motion using Criminal Procedure Form 40, but failed to sign under the declaration paragraph following paragraph 18 on page 5 (PCR L.F. 169). The motion noted that Mr. Wallingford did sign and notarize his signature after the Forma Pauperis Affidavit on page 6 of Form 40 (PCR L.F. 169). The motion alleged that Mr. Wallingford did not realize that he had to sign below *both* paragraph 18 and the Forma Pauperis Affidavit, and that appointed counsel first learned that the signature was missing just prior to November 26, 2001, the date she filed the amended motion (PCR L.F. 169-170). The motion alleged that Mr. Wallingford and counsel had taken the steps necessary to cure the deficiency in the *pro se* pleading, by having Mr. Wallingford sign a declaration

tracking the language of the declaration paragraph set out below paragraph 18 on page 5 of Form 40 (PCR L.F. 170). The motion argued that the error in Mr. Wallingford not signing his motion must be and *can be* cured, under Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000) (PCR L.F. 170).

In addition to the motion, counsel filed a declaration signed by Mr. Wallingford (PCR L.F. 167-168). The declaration stated:

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My name is John A. Wallingford. I am the Movant in this cause. When I filed my Form 40, I did not realize that I had to sign my name at the bottom of page 5, underneath the paragraph after paragraph 18. I did not sign at the bottom of page 5. To correct this omission, I state as follows:

1. I, John A. Wallingford, movant in this case, state by subscribing to this Declaration that I know the contents of my *pro se* Rule 29.15 motion, filed on August 21, 2001, that the information stated in my *pro se* motion is, to the best of my knowledge, true and correct, that I listed in my *pro se* motion every claim known to me for vacating, setting aside, or correcting the conviction and sentence attacked in the *pro se* motion; and that I understand that I waive any claim for relief known to me that I did not list in my *pro se* motion.

(PCR L.F. 167-168).

On March 13, 2002, the motion court issued findings of fact and conclusions of law denying Mr. Wallingford's motion for postconviction relief (PCR L.F. 172-174). The motion court found that it had no jurisdiction over Mr. Wallingford's Rule 29.15 motion, because Mr. Wallingford had failed to sign his *pro se* motion (PCR L.F. 172-173). The court rejected Mr. Wallingford's attempt to remedy the defect, finding that Mr. Wallingford had failed to file a legally sufficient motion for postconviction relief within the 90 days after the Court of Appeals issued its mandate (PCR L.F. 172-173).

The motion court clearly erred in finding that it had no jurisdiction to allow Mr. Wallingford to cure the deficiency in his Form 40.

Mr. Wallingford recognizes that the requirement of a signature "is not a hollow, meaningless technicality." Tooley v. State, 20 S.W.3d 519, 520 (Mo. banc 2000). Indeed, as noted in Tooley, the signature requirement "constitutes a certificate that the filing is not for any improper purpose and is well grounded in fact" and "makes certain the party actually assents to the filing of the action on his or her behalf." Id. This Court held in Tooley that the movant's signature is a mandatory element for jurisdiction to attach, and that an unsigned motion for postconviction relief is a nullity and does not invoke the jurisdiction of the court. Id. The Court noted, however, that the Court had previously eliminated the requirement that the *pro se* motion be verified, while remaining "stringent" about the time limits for filing postconviction relief motions. Id.; *citing*, State v. White, 873 S.W.2d 590, 594 (Mo. banc 1994).

Like Mr. Wallingford, Tooley filed a timely Form 40 but did not sign the form. Tooley, 20 S.W.3d at 520. This Court noted that Rule 55.03 applies to motions for postconviction relief, and held that an unsigned motion fails to confer jurisdiction in the motion court and is a nullity. Id. The Court noted, however, that the motion court dismissed Tooley's motion before the expiration of the 90-day time limit. Id. Because Rule 55.03(a) provides that an unsigned pleading is to be stricken unless omission of the signature is corrected promptly after being called to the attention of the party or the attorney, the Court believed that Tooley was entitled to "the opportunity to correct the deficiency." Id. The Court reversed the dismissal and remanded the cause back to the motion court for further proceedings on the motion. Id.

Rule 55.03(a) should be applied to this case, to allow Mr. Wallingford to remedy the lack of signature on his *pro se* motion. Rule 55.03(a) does not limit the time for taking action to correct the omission of the signature. The only requirement is that the omission be corrected ***promptly*** after it is *called to the attention of the party or the attorney*. Allowing Mr. Wallingford to file and rely upon his Declaration, filed within a matter of a few months after his *pro se* motion was filed and shortly after the omission was called to his attorney's attention, is well within the dictates of Rule 55.03(a), and is a logical extension of Tooley's holding that the movant should be given an opportunity to correct the deficiency.

Mr. Wallingford recognizes that the Court in Tooley implied that the movant was entitled to correct the defect because his case was dismissed before the expiration

of the 90-day period within which a *pro se* motion could have been filed. Tooley, 20 S.W.3d at 520. But by the time this Court decided that Tooley should be allowed to cure the lack of signature, over two years had passed since the filing of the deficient *pro se* motion.² In this case, Mr. Wallingford tried to cure the lack of signature within five months after he filed his *pro se* motion, and as soon as possible after his attorney learned of the deficiency (PCR L.F. 167-168, 169).

Over the years, this Court has eased the requirements for inmates seeking to file *pro se* motions for postconviction relief under Rule 29.15. Whereas the initial version of Rule 29.15, effective January 1, 1988, required that both the *pro se* and amended motions include the verified signature of the movant, Rule 29.15(d) and (f)(Repealed January 1, 1996), the current Rule 29.15 requires only that the movant declare in the *pro se* motion that he has included all the claims for relief known to him and that he

² The Supreme Court's published opinion does not indicate the date that Tooley's *pro se* motion was filed. However, the Court of Appeals' unpublished opinion, which was superceded by the Supreme Court's opinion on transfer, is available on Westlaw and indicates that Tooley filed his *pro se* motion on May 19, 1998. Tooley v. State, 1999 WL 1101405 (Mo. App. W.D. 1999). The Supreme Court's opinion was issued on June 13, 2000. 20 S.W.3d at 519.

Notably, Tooley, like Mr. Wallingford, signed and notarized his forma pauperis affidavit, but failed to sign the actual motion. Tooley, 1999 WL 1101405.

understands that he waives any claim for relief known to him that is not included in the motion. Rule 29.15(d). The current version of Rule 29.15(g) requires only that the movant or his attorney *sign* the amended motion. The gradual easing of these requirements has been reflected in the case law.

In Wilson v. State, 813 S.W.3d 833 (Mo. banc 1991), the movant filed an unverified *pro se* Rule 24.035 motion, but his attorney filed a timely, properly verified amended motion. Id. at 834. This Court held, “Because the sole deficiency in the *pro se* motion, the absence of verification, was remedied by a timely filed, verified, amended motion that presented the claims litigated in this proceeding, the purpose of the verification requirement was satisfied in this case.” Id. The Court found that the motion court had jurisdiction to proceed on the amended motion. Id.

In State v. Bradley, 811 S.W.2d 379, 383 (Mo. banc 1991), the movant filed a *pro se* motion that was signed and verified by the movant, but which lacked his declaration that he had listed all of the grounds for relief known to him, and that he acknowledged waiver of any unlisted grounds. This Court held that such a motion does not suffer from a fatal jurisdictional infirmity. Id. The Court noted that Rule 29.15(e) directs appointed counsel to amend the *pro se* motion to allege any additional grounds for relief that were omitted from the *pro se* motion. Id. To make the absence of a declaration into a jurisdictional defect would conflict with the motion court having the power to appoint counsel and to permit an amendment. Id.

Additionally, the Court pointed out that the purpose of the verification requirement was to discourage frivolous and unfounded pleadings, whereas the declaration requirement was intended to assure finality of the adjudication in a single proceeding. Id. at 383-384. The Court reasoned that the declaration was not necessary to achieve the goal of finality, and that appointed counsel could supply the required declaration in a timely amended motion. Id. The Court found that the timely filing of the defendant's verified *pro se* motion, even though it failed to include the declaration that all claims were included, was sufficient to invoke the circuit court's jurisdiction. Id.

In State v. White, 873 S.W.2d 590, 594 (Mo. banc 1994), this Court finally did away with the requirement that the *pro se* motion be verified. The Court held that "henceforth, for purposes of filing a *pro se* 29.15 motion, the defendant's signature will be sufficient verification 'that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.'" Id.

In relaxing the verification requirements for *pro se* motions, the Court distinguished between an original *pro se* motion and an amended motion. The Court noted that the *pro se* motion is "relatively informal" and "need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." Id.; *citing*, Bullard v. State, 853 S.W.2d 921, 922 (Mo. banc 1993). On the other hand, the amended motion is a "final pleading, which requires legal

expertise”, and counsel must be appointed to ensure that it is drafted properly. White, 873 S.W.2d at 594; *citing*, Bullard, 853 S.W.2d at 922.

In this case, Mr. Wallingford’s *pro se* motion gave the requisite notice to the trial court and the state that he intended to pursue relief under Rule 29.15. Mr. Wallingford abided by the stringent time limit set out in Rule 29.15. The motion was filed within 90 days of the Court of Appeals issuing its mandate, and Mr. Wallingford filled out the Form 40 completely, with one exception, and thoroughly listed his claims of ineffective assistance of trial and appellate counsel (PCR L.F. 5-79, 87-88). Mr. Wallingford completed the Forma Pauperis Affidavit on page 6, the very last page of Form 40, signed at the bottom of page 6, and had his signature notarized (PCR L.F. 10). The only deficiency in Mr. Wallingford’s motion was his failure to sign where indicated under the last paragraph on page 5 of Form 40 (PCR L.F. 9). Mr. Wallingford quite plainly sought to invoke the jurisdiction of the motion court when he filed his Form 40.

Mr. Wallingford should have been allowed to cure the lack of signature, either under Rule 55.03(a) or by the filing of his timely, signed amended motion. Mr. Wallingford should have been allowed to have the motion court consider his case on the merits. First, the *pro se* motion is an informal pleading filed by an inmate acting without the assistance of counsel, and is intended to give notice to the courts and state that the movant seeks postconviction relief. White, 873 S.W.2d at 594; Bullard, 853

S.W.2d at 922. Mr. Wallingford's *pro se* motion achieved this goal, regardless of the lack of signature at the bottom of page 5.

The motion court understood that Mr. Wallingford intended to seek postconviction relief, and the court appointed counsel to represent Mr. Wallingford on his Rule 29.15 motion (PCR L.F. 1, 80). The motion court granted appointed postconviction counsel an extension of time until November 26, 2001, to file an amended motion, and set the case for status review on January 7, 2001 (PCR L.F. 1, 80, 86). Until March 13, 2002, Mr. Wallingford had an evidentiary hearing set for April 3, 2002 (PCR L.F. 2). The lack of a signature at the bottom of page 5 did not confuse the motion court as to Mr. Wallingford's intentions, nor did it prevent the court from taking action on his motion.³

Second, Mr. Wallingford's signature and notarization under the Forma Pauperis Affidavit (PCR L.F. 10) are sufficient to show that Mr. Wallingford assented to the filing of the action and in fact intended for his *pro se* motion to be filed. See, Tooley, 20 S.W.3d at 520. Clearly, an inmate taking the trouble to fill out a Form 40, complete

³ The fact that the motion court treated Mr. Wallingford's motion in such a routine manner raises the question of whether anyone reviewing the case would have noticed the lack of signature if Mr. Wallingford had not raised the issue. Mr. Wallingford should not be penalized for his candor in bringing the deficiency in his motion to the court's attention, or for trying to correct that deficiency.

a Forma Pauperis Affidavit, and make arrangements in a prison so that he can sign it in the presence of a notary intends to file that motion and to seek relief under it. That Mr. Wallingford then mailed the *pro se* motion to the Circuit Court of Buchanan County so that it arrived before the time for filing expired is further indication of his assent to the motion being filed.

Third, coming as it does at the very end of the pleading, it is reasonable to infer that Mr. Wallingford believed that his signature and the notarization of the Forma Pauperis Affidavit applied to all of the pleadings contained in his *pro se* motion. It should be noted that the area provided for the Forma Pauperis Affidavit, the movant's signature under the affidavit, and the notary's signature and stamp cover the entire last page of Form 40 (PCR L.F. 10). By contrast, the declaration that the motion contains all of the movant's claims and that the movant waives all unstated claims takes up less than the bottom third of page 5, even with a line for the movant's signature (PCR L.F. 9). In light of the thoroughness with which Mr. Wallingford filled out the rest of his motion, it is apparent that the failure to sign the motion at the bottom of page 5 was a mere oversight.

Fourth, Mr. Wallingford informed both his appointed postconviction counsel and the motion court that he had failed to sign the motion and that he wanted to correct the oversight (PCR L.F. 166, 167-168, 169-170). After Mr. Wallingford informed counsel of the oversight, he then filed a *pro se* "motion to correct clerical mistake

under Rule 29.12(c)”, asking the motion court to allow him to correct his unsigned *pro se* motion (PCR L.F. 166, 167-168, 169-170).

Fifth, following Mr. Wallingford’s *pro se* motion to correct the deficiency, appointed postconviction counsel filed a “motion to accept movant’s declaration pursuant to Tooley v. State” (PCR L.F. 169-170).⁴ The motion alleged that Mr. Wallingford did not realize that he had to sign under *both* the declaration under paragraph 18 *and* the Forma Pauperis Affidavit, and that Mr. Wallingford and counsel had taken the steps necessary to cure the deficiency in the *pro se* pleading, by having Mr. Wallingford sign a declaration tracking the language of the declaration on page 5 of Form 40 (PCR L.F. 170). In addition to the motion, counsel filed the declaration signed by Mr. Wallingford (PCR L.F. 167-168). The declaration filed by Mr. Wallingford was identical to the declaration set forth at the bottom of page 5 of Form 40 (PCR L.F. 167-168). By filing the Declaration, Mr. Wallingford informed the court that his motion is not intended for any improper purpose and that he believes that it is well-grounded in fact, as required by Tooley, 20 S.W.3d at 519.

⁴ While the motion did not specifically refer to Rule 55.03(a) (PCR L.F. 169-170), Mr. Wallingford’s reliance on that Rule is implicit, since this Court’s decision in Tooley relied on Rule 55.03(a) to allow Tooley to correct the lack of signature. 20 S.W.3d at 520.

Finally, Mr. Wallingford's appointed postconviction counsel filed a timely amended motion, signed by the attorney (PCR L.F. 87-165). The amended motion signed by counsel remedied the sole deficiency in the *pro se* motion, the lack of signature. As in Wilson, 813 S.W.2d at 834, Mr. Wallingford respectfully requests that this Court hold that the filing of a timely amended motion, signed by the movant's attorney, remedies a lack of signature on the movant's *pro se* motion.

The motion court clearly erred in dismissing Mr. Wallingford's motion for lack of jurisdiction, and in refusing to allow him to correct the deficiency in his *pro se* motion, either via his signed Declaration or by the filing of his timely amended motion signed by counsel. All of the essential functions of a signed pleading have been satisfactorily established, and there has never been any confusion or question as to whether Mr. Wallingford intended to invoke the motion court's jurisdiction and pursue postconviction relief. The motion court's error in dismissing Mr. Wallingford's Rule 29.15 motion violated Mr. Wallingford's rights to counsel and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. The judgment of the motion court must be reversed, and the cause must be remanded for further proceedings on Mr. Wallingford's Rule 29.15 motion.

ARGUMENT II

The motion court clearly erred in denying Appellant’s Rule 29.15 motion without issuing findings of fact and conclusions of law on all allegations raised in the amended motion. The motion court’s failure to rule on Appellant’s issues violated the explicit requirements of Rule 29.15 and denied Appellant an opportunity for meaningful appellate review and due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Rule 29.15 requires courts to “issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held.” Rule 29.15(i). It is well established that the failure to do so constitutes reversible error. See, e.g. Fields v. State, 572 S.W.2d 477 (Mo.banc 1987); Barry v. State, 850 S.W.2d 348, 349-350 (Mo. banc 1993). In this case, the motion court clearly erred, because the court did not issue specific findings of fact and conclusions of law on each of the issues raised in Mr. Wallingford’s amended Rule 29.15 motion.

In an appeal of a Rule 29.15 motion, review is limited to a determination of whether the findings and conclusions of the hearing court are clearly erroneous. Barry, 850 S.W.2d at 349-350; Rule 29.15(j). The findings of fact and conclusions of law must be sufficiently specific to allow meaningful appellate review. Barry, 850 S.W.2d at 350. The appellate court will not “supply the necessary findings of fact by implication; to do so would improperly constitute a de novo review.” Charles v. State,

792 S.W.2d 59, 60 (Mo. App. 1990); *citing*, Criner v. State, 790 S.W.2d 524, 525 (Mo.App. 1990).

Mr. Wallingford's amended motion made several factual allegations of ineffective assistance of trial and appellate counsel (PCR L.F. 88-160). The amended motion alleged ineffective assistance of trial counsel for failing to investigate a defense of alibi to one of the alleged sales of crack cocaine (PCR L.F. 88-91), and physically incorporated all of the claims set forth in Mr. Wallingford's *pro se* motion (PCR L.F. 91-160).

The motion court did not address any of these issues in its findings of fact and conclusions of law (PCR L.F. 172-174). Instead, the motion court held that it had no jurisdiction over Mr. Wallingford's case because he did not sign where indicated at the bottom of page 5 of Form 40 (PCR L.F. 172-174).

While it is true that no remand is required for specific findings if the record demonstrates the correctness of the motion court's findings, Guyton v. State, 752 S.W.2d 390 (Mo.App. 1988), the record does not demonstrate such correctness in this case. As argued in Point I, the motion court did indeed have jurisdiction over Mr. Wallingford's case, because Mr. Wallingford invoked the motion court's jurisdiction by filing his Form 40, and took steps to correct the lack of signature. Mr. Wallingford filed a signed Declaration stating that his failure to sign the *pro se* motion was unintentional, that his *pro se* motion contained all the claims known to him for vacating or setting aside his convictions and sentences, and that he understood that he

was waiving any claims known to him that he did not raise in his *pro se* motion (PCR L.F. 167-168). Additionally, Mr. Wallingford filed a timely amended motion signed by his attorney (PCR L.F. 87-165).

Nevertheless, the motion court made no findings on any of the issues raised in Mr. Wallingford's amended motion (PCR L.F. 172-174). The motion court's failure to do so denied Mr. Wallingford an opportunity for appellate review, which is provided for under Rule 29.15(j). This error denied Mr. Wallingford due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. This Court must reverse and remand with instructions that the motion court enter findings of fact and conclusions of law on all the issues presented by Mr. Wallingford's Rule 29.15 postconviction motion.

ARGUMENT III

The motion court clearly erred in assessing court costs against Appellant and ordering Appellant to pay \$108.00 under the Prisoner Litigation Reform Act for filing a Rule 29.15 motion, in violation of Appellant's rights to due process of law and to equal protection of the law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by Article I, Sections 10 and 18(a) of the Missouri Constitution, because the court's order exceeds the power granted the court by Section 506.360 et seq., in that Rule 29.15(b) specifically states that "No cost deposit shall be required", and the Prisoner Litigation Reform Act does not encompass Rule 29.15 as a civil action.

The motion court, in denying Mr. Wallingford's Rule 29.15 motion, assessed court costs against Mr. Wallingford, citing the Prisoner Litigation Reform Act, Section 506.360 et seq., RSMo 2000 (PCR L.F. 174). The court directed that Mr. Wallingford's prison withhold funds from Mr. Wallingford's inmate account on a monthly basis, beginning in March 2002, until Mr. Wallingford has paid \$108.00 in court costs (PCR L.F. 174).

This Court's review is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. McElheny v. State, 29 S.W.3d 861, 862 (Mo. App. 2000). They are clearly erroneous when a review of the entire record leaves a definite and firm impression that a mistake has been made. Id.

Missouri's Prisoner Litigation Reform Act provides for the partial payment of court costs by prisoners who bring "civil actions" or who appeal judgments rendered in "civil actions". Section 506.366 and 506.369, RSMo 2000. An indigent offender seeking to file a civil suit as a poor person must file a request to the court to proceed without the prepayment of fees. Section 506.366. Section 506.369 provides a procedure for the court to order the indigent offender to make partial payments of the court costs. While Section 514.040.2, RSMo 2000 allows some indigent litigants to file suit *in forma pauperis*, it also mandates, "In any civil action brought in a court of this state by any offender convicted of a crime who is confined in any state prison or correctional center, the court shall not reduce the amount required as security for costs . . . to less than ten dollars". Section 514.040.2 goes on to state, "This subsection shall not apply to any action for which no sum as security for costs is required to be paid upon filing such suit."

Rule 29.15 provides the exclusive remedy for a person convicted of a felony after trial to seek relief in the sentencing court from constitutional violations, including claims of ineffective assistance of trial and appellate counsel. Rule 29.15(a). A motion for relief filed under Rule 29.15 must be "substantially in the form of Criminal Procedure Form No. 40". Rule 29.15(b). When an indigent movant files a *pro se* motion, the circuit court is required to appoint counsel to represent the movant. Rule 29.15(e). Rule 29.15(b) specifically states, "No cost deposit shall be required."

Rule 29.15 makes no reference to the Prisoner Litigation Reform Act, Section 506.360, RSMo 2000, et.seq., nor does the Rule set forth any procedures by which circuit courts may impose court costs on postconviction movants. Rule 29.15 does not require a cost deposit upon the filing of the motion, nor does the movant need to file a motion under Section 506.366 requesting the waiver of prepayment of fees. For this same reason, actions under Rule 29.15 are specifically excluded from court costs under Section 514.040.2.

Furthermore, Sections 506.375(1) and (3) provide for the dismissal of a civil action where the allegation of indigency is untrue, or where the defendant is immune from the cause of action. These sections do not apply to Rule 29.15 motions. If a Rule 29.15 movant is found not to be indigent, then the case is not dismissed. Instead, the movant is not eligible for Public Defender services, and the motion court changes its order permitting the movant to proceed *in forma pauperis*. See, Bennett v. State, 88 S.W.3d 448, 450 (Mo. banc 2002). A Rule 29.15 motion is not subject to dismissal based on the defendant's immunity, because the defendant is the state, and Rule 29.15 does not provide the state with immunity from postconviction relief claims.

Other provisions of the Prisoner Litigation Reform Act are clearly inapplicable to postconviction relief claims. Section 506.381 requires review, before docketing or shortly thereafter, of a complaint in which an offender seeks redress from a governmental entity, officer or employee; Section 506.384 requires exhaustion of administrative remedies; and Section 506.387 discusses how monetary damages

awarded to an offender are to be paid; and Section 506.390 requires notification to crime victims of pending payment of compensatory damages to an offender in connection with a civil action. None of these sections are applicable to a Rule 29.15 motion.

A Rule 29.15 motion is a challenge to the underlying criminal case. It is undoubtedly for this reason, and because the Rule provides the exclusive remedy in the trial court for an inmate claiming a constitutional violation in his criminal case, that Rule 29.15 does not require the movant to pay costs.

Notably, the few cases listed under the Prisoner Litigation Reform Act in Vernon's Annotated Missouri Statutes all deal with clearly civil actions not pertaining to constitutional violations at trial. For example, Harris v. Munoz, 6 S.W.3d 398 (Mo. App. 1999), involved a civil action arising out of an inmate losing his portable stereo and headphones, and Adams v. Schriro, 31 S.W.3d 461 (Mo. App. 2000), dealt with the alleged mishandling of the receipts from the prisoners' canteen. A third case, Cooper v. Minor, 16 S.W.3d 578 (Mo. banc 2000), concerned complaints about guards confiscating the inmate's legal papers and imposing time in segregation, along with other disciplinary actions. Rightly so, none of the cases listed under this group of statutes in V.A.M.S. are even remotely related to postconviction relief proceedings under Rule 29.15. This fact demonstrates that the overwhelming majority of the courts of this state recognize that the Prisoner Litigation Reform Act does not apply to

incarcerated people challenging the validity of their criminal convictions and sentences.

A motion for postconviction relief does not fall under the requirements of the Prisoner Litigation Reform Act. To allow a circuit court to assess costs in a Rule 29.15 proceeding would have a chilling effect on potential postconviction movants, who would refrain from filing meritorious postconviction relief motions, so as to avoid having their meager prison wages consumed by court costs.

The motion court clearly erred in assessing court costs against Mr. Wallingford and in ordering that the prison withhold funds from his inmate account under the Prisoner Litigation Reform Act (PCR L.F. 174). The court's error violated Mr. Wallingford's rights to due process of law and to equal protection, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Mr. Wallingford respectfully requests that this Court reverse the judgment of the motion court and vacate the motion court's assessment of court costs against Mr. Wallingford, and order that the Circuit Court of Buchanan County return to Mr. Wallingford any money already taken from his inmate account pursuant to the motion court's order.

CONCLUSION

Based on the Arguments presented in Points I and II, John A. Wallingford respectfully requests that this Court reverse the judgment of the motion court and remand this cause for further proceedings on his Rule 29.15 motion. Based on the Argument presented in Point III, John A. Wallingford respectfully requests that this Court reverse the judgment of the motion court and vacate the motion court's assessment of court costs against Mr. Wallingford, and order that the Circuit Court of Buchanan County return to Mr. Wallingford any money already taken from his inmate account pursuant to the motion court's order.

Respectfully submitted,

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Certificate of Compliance and Service

I, Susan L. Hogan, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 7,691 words, which does not exceed the 31,000 words allowed for an appellant's brief.

2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on December 10, 2003. According to that program, this disk is virus-free.

3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Ms. Andrea K. Spillars, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the 15th day of December, 2003.

Susan L. Hogan

APPENDIX

Findings of Fact, Conclusions of Law, and Judgment	A-1 through A-3
Rule 29.15	A-4 through A-9
Prisoner Litigation Reform Act (Section 506.360, RSMo 2000, et seq.)	A-10 through A-11